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Supreme Court of the United States

October Term, 1969

No. 101

CITY OF CHICAGO, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

No. 102

CITY OF CHICAGO, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE

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No. 101

CITY OF CHICAGO, *et al.*,
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No. 102

CITY OF CHICAGO, *et al.*,
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v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

---

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE

THE INTEREST OF THE NARUC AS AMICUS CURIAE

The National Association of Regulatory Utility Commissioners, herein referred to as the "NARUC", is a quasi-governmental nonprofit organization founded in

1889. Within its membership are the governmental bodies of the fifty States engaged in the regulation of carriers and public utilities. The chief objective of the NARUC is to serve the public interest through improving the quality of government regulation.

More specifically, the NARUC contains the State officials charged with the duty of regulating railroad operations within their respective States and as such they are experienced in the interrelations of Federal and State railroad regulation, and with the many ramifications applicable to the overall regulation of the railroad industry. They have the obligation to assure, within their respective States, the establishment and maintenance of such railroad service and facilities as may be required by the public convenience and necessity, and to see that the same are provided at rates and charges that are just and reasonable.

In instances, such as reflected by this litigation, where State jurisdiction is preempted under Section 13a of the Interstate Commerce Act (49 U.S.C., Sec. 13a), involving the proposed discontinuance of interstate passenger train service, the member agencies of the NARUC have the duty of advocating the public interest of their respective States before the Interstate Commerce Commission when necessary to preserve vital service. And in instances where the Commission decides to allow the discontinuance of such service, the member agencies of the NARUC, as the tribunes of the public of their respective States, have the ancillary duty to appear before the Federal courts to test the compatibility of such Commission decisions with the requirements of Section 13a and other applicable provisions of Federal law.

Since these appeals present the issue of whether the NARUC member agencies and other public representatives have the same right as a railroad to seek judicial

review of final decisions of the Commission in passenger train discontinuance cases, the disposition of these appeals by the Court will be of paramount regulatory importance and will have a direct affect on the future vitality of State agencies in advocating the public interest in the field of railroad service. Therefore, the members of the NARUC, as government regulators, have a vital and direct interest in these appeals.

STATUTES INVOLVED

Section 13a of the Interstate Commerce Act, 49 U.S.C. § 13a, 72 Stat. 571, provides:

> (1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one state to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by

the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change

unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisidction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of

> such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

28 U.S.C. 1336(a) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The introductory clause of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 701(a), provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that–
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

Section 10(a) of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 702, provides:

> A person suffering legal wrong because of agency action, or adversely affected or

aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

QUESTION PRESENTED

Whether the findings and decision of the Interstate Commerce Commission, issued after hearing and investigation, allowing the discontinuance of operation of railroad train service, purportedly pursuant to Section 13a(1) of the Interstate Commerce Act, as amended (49 U.S.C., Sec. 13a(1)), are subject to review by a United States District Court upon the complaint of an interested party adversely affected or aggrieved by such findings and decision.

STATEMENT

These cases concern direct appeals from two final orders of a three-judge United States District Court for the Northern District of Illinois which dismissed for lack of jurisdiction actions brought by the appellants to review the lawfulness of decisions of the Interstate Commerce Commission allowing the appellees to discontinue the operation of certain passenger train service known as the "Georgian" and "Hummingbird."

The Georgian passenger train is operated jointly by the Chicago & Eastern Illinois Railroad Company (C&EI) and the Louisville & Nashville Railroad Company (L&N) between Chicago, Illinois, and Atlanta, Georgia. C&EI operates the train between Chicago and Evansville, Indiana, a distance of 287 miles; and the L&N operates the train the remaining 444 miles to Atlanta. This Chicago-Atlanta service was provided daily in each direction.

The Hummingbird passenger train is operated by the L&N between Cincinnati, Ohio, and New Orleans, Louisiana, a distance of 927 miles. The Georgian and Hummingbird interconnect in Nashville, Tennessee, where certain cars are interchanged between the trains.

The C&EI on August 31, 1967, gave notice to the Commission, the Governors of Illinois and Indiana, and others, purportedly pursuant to Section 13a(1), of its intention to discontinue operation of its segment of the Georgian between Chicago and Evansville effective October 1, 1967. The Commission on September 18, 1967, instituted an investigation into the proposed discontinuance of C&EI's segment of the Georgian (Finance Docket No. 24725), and by the same order required continued operation for the maximum statutory period of four months pending hearing and decision in its investigation. A. 17-18. Division 3 of the Commission, by report and order served on January 31, 1968, allowed discontinuance of C&EI's segment of the Georgian. *Chicago & Eastern Illinois Railroad Co. – Discontinuance of Trains, etc.*, 331 I.C.C. 447 (No. 101, A. 19-40). C&EI discontinued this segment on February 1, 1968, so that the Georgian now only operates between Evansville and Atlanta.[1]

Certain protestants petitioned the Commission for reconsideration of its decision in the Georgian case on the ground, *inter alia*, that C&EI did not effectively invoke the Section 13a(1) remedy, and hence did not supersede contrary State requirements, because notice of the proposed discontinuance was not posted at stations

[1] L&N on July 9, 1969, filed a Section 13a(1) notice of its intention to discontinue the remaining Evansville-Atlanta segment of the Georgian effective August 13, 1969. The Commission instituted an investigation on July 30, 1969, and ordered continued operation pending hearing and decision. *Louisville and Nashville Railroad Company – Discontinuance of Trains, etc.*, Finance Docket No. 25765.

south of Evansville, and that notice, as posted on the Chicago-Evansville segment, failed to describe the through-route nature of the train.[2] However, Division 3 of the Commission, acting as an Appellate Division, denied reconsideration by an order served on May 15, 1968. A. 44-45. The protestants (appellants in No. 101) on May 27, 1968, instituted an action in the United States District Court for the Northern District of Illinois seeking review of the Commission's decision with respect to the C&EI segment of the Georgian.[3] A. 69-88.

The L&N on April 3, 1968, gave notice under Section 13a(1) of its intention to discontinue the Hummingbird passenger service between Cincinnati and New Orleans effective May 7, 1968. The L&N contended that the discontinuance of C&EI's segment of the Georgian on February 1, 1968, resulted in the loss of the bulk of the passenger business of the Hummingbird. The Commission on April 24, 1968, instituted an investigation into the proposed discontinuance of the Hummingbird, and required its continued operation for the maximum statutory period of four months pending hearing and decision in the investigation. A. 46-47. Division 3 of the Commission, by report and order served on September 6, 1968, allowed discontinuance of the Hummingbird. 333 I.C.C. 720; A. 48-67.

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[2] This contention requires a judicial interpretation of the word "train" as used in Section 13a(1).

[3] The original plaintiffs were City of Chicago, Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes and Maurice F. Radrizzi (United Transportation Union). Intervening plaintiffs were Alabama Public Service Commission, Georgia Public Service Commission, Indiana Public Service Commission, Kentucky Railroad Commission, Mississippi Public Service Commission, Tennessee Public Service Commission, City of Evansville, City of Henderson, and National Association of Railroad Passengers.

Parties aggrieved by the allowance of discontinuance (the appellants in No. 102)[4] immediately instituted an action in the United States District Court for the Northern District of Illinois seeking review of the Commission's decision. The District Court issued a temporary restraining order on September 6, 1968, to prevent the discontinuance of the Hummingbird (A. 112), and the order was continued on September 12th (A. 113).

The Georgian and Hummingbird cases were heard together by the same three-judge panel of the District Court on November 4, 1968. The defendant railroads contended that the nature of the Commission's decisions made them unreviewable. The United States and the Commission, although defendants, agreed with the plaintiffs in their threshold contention that the District Court did have jurisdiction to review. Nevertheless, the District Court on January 8, 1969, granted the motions of the C&EI and the L&N to dismiss the complaints for lack of jurisdiction over the subject matter, and dissolved the temporary restraining order. The Court held that a Commission decision allowing discontinuance of train service under Section 13a(1) was not a reviewable "order" within the meaning of the provision of the Judicial Code which confers jurisdiction on the district courts to review Commission orders. 28 U.S.C., Sec. 1336(a).

The District Court acknowledged that railroads have a right to seek review under the Judicial Code in cases

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[4] The original plaintiffs were the Alabama Public Service Commission, State of Louisiana, Ohio Public Utilities Commission, Tennessee Public Service Commission, City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Railway Labor Executives' Association and United Transport Service Employees (AFL–CIO). The Kentucky Railroad Commission and the Mississippi Public Service Commission later intervened.

where the Commission by "order" requires continuation of train service, and that "there might be some unfairness here". However, the District Court observed that "it is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review (by the public)". Accordingly, the District Court held that Congress intended to deny judicial review in cases where the Commission allowed discontinuance of train service. 294 F. Supp. 1106-7; A. 13-16.

Following the District Court's denial of an application for stay, the L&N on January 9, 1969, discontinued the Hummingbird in mid-run at Birmingham, Alabama.

This Court on June 16, 1969, noted probable jurisdiction and consolidated the appeals. __ U.S. ___, 23 L.Ed. 2d 744, 89 S.Ct. 2103.

ARGUMENT

I.

THE RIGHT OF JUDICIAL REVIEW IS ONE OF THE BASIC TENETS OF OUR JURISPRUDENCE AND SHOULD BE LIBERALLY CONSTRUED.

The principle of judicial review evolved as a part of the common law on a case-by-case basis. Under our system of government, the Federal judiciary is the ultimate arbiter of issues regarding the lawfulness of the actions of Federal officers and agencies. As it was stated in the Final Report of the Attorney General's Committee on Administrative Procedure (1941) at p. 75:

> [T]o a very considerable degree, judicial review of administrative action is molded by the courts. Theirs is the power of final interpretation of the statutory guides, and theirs is

> the power to provide judge-made remedies when statutes are silent.

In contrast to the English system, where the Crown historically constituted the source of power and accordingly commissioned judges to review administrative action, it is theoretically more difficult for the American judiciary to assert jurisdiction to review administrative action under the constitutional doctrine of separation of powers.[5] However, notwithstanding the separation of powers, this Court has construed its own charter as stated in Article III, Section 2, of the Constitution as paramount.[6]

The specific origins of jurisdiction to review administrative decisions can be traced to an assumption made by the early state courts which were often direct descendants of colonial courts chartered by the King of England. These courts assumed they had inherited the powers of the English courts and they, therefore, claimed the prerogative writ jurisdiction of the King's Bench.[7]

As was stated in the dissent in *Kendall v. United States ex rel Stokes*, 12 Pet. 524, 630, 9 L.Ed. 1181, 1223 (1838):

> [The power to issue prerogative writs was] possessed by the court of kings bench; because the king originally sat there in person and aided the administration of justice. . . . [T]his power would not be incident to any court

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[5] Jaffe, Judicial Review of Administrative Action, p. 154 (3rd ed. 1965).

[6] Stark v. Wickard, 321 U.S. 288, 310, 88 L.Ed. 733, 748 (1944).

[7] *E.g.* Howard v. Gage, 6 Mass. 462, 463-64 (1810); Runnel v. Winemiller, 4 Harr. & McH. 429 (Md. 1799); State v. Justices, 1 Coxe 244 (N.J. 1794).

> which did not possess the general superintending power of the court of kings bench, in which sovereignty might by construction of law be supposed to sit and to exert there its prerogative powers . . . in order that a right might not be without a remedy.

The railroad regulatory agencies had their beginnings in the States *circa* 1870. Their development was a response to the de-emphasis of agrarianism and to the initial growth of our urban, industrial society.[8] But then as the legislatures directed their attention to the burgeoning need for utility regulation in the last decade of the Nineteenth Century and the first decade of this Century, they attempted to relieve regulatory agencies of the "burden" of judicial review so far as possible.[9]

However, the lack of wisdom in such attempts became evident in our "rights" oriented society because as Pound stated:

> In a constitutional legal polity all exercise of the power of politically organized society calls for checks. That checks are peculiarly needed with respect to administrative adjudication is made clear by consideration of certain tendencies which may be seen in administrative action not merely in American administrative agencies, federal and state, but in like agencies in England and in the British dominions. *Id.*, at 438.

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[8] II Pound, Jurisprudence, p. 410 (1950).

[9] *Id.*, at 413. Pound refers to an amendment to the California Constitution adopted in 1911 providing that decisions of the railroad commission shall not be subject to review by any court except where such decision will result in confiscation of property. Const. Cal. art. § 20.

In accord with this concept favoring judicial "checks", this Court in recent times greatly expanded the scope of judicial review in a series of cases. For example, in *Powell v. McCormack*, ___ U.S. ___, 23 L.Ed2d 491 (1969), the Court reviewed the validity of a members' exclusion from the House of Representatives. And in *Wesberry v. Sanders*, 376 U.S. 1, 11 L.Ed.2d 481 (1964), *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962), and similar cases, judicial remedies were applied in cases contesting the validity of Federal and State legislative apportionments.

In the light of this evolution, two writers in the field of administrative law have asserted that there is a presumption of judicial review. Professor Jaffe, in his work quoted by this Court in *Abbott Laboratories v. Gardner*,[10] states that:

> I start with a rash, and some will say a meaningless, proposition. It is this: in our system of remedies, the individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity. This is to me the teaching of our history and tradition. It is our common law, and in a lesser measure a corollary of our constitutions. I am well aware that this assertion can be criticized as a futile, an empty, a useless generality. I think on the contrary that it is an important proposition, and if it is entertained by a court it may become a crucial factor in the decision to review. . . . [I]n cases of statutory ambiguity or silence, and in new situations in which there

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[10] 387 U.S. 136, 18 L.Ed. 2d, 681 (1967).

> are factors pro and con, the issue of reviewability may become acute. In such situations the presumption of reviewability plays a decisive role. Jaffe, *Judicial Control of Administrative Action*, p.336 (3rd ed. 1965).

To the same effect, Kenneth Culp Davis in his article entitled *Unreviewable Administrative Action*, 15 F.R.D. 411, 426 (1954) states: "The decisions . . . fit reasonably well the idea of a presumption of reviewability that may be rebutted by *affirmative* indication of legislative intent in favor of unreviewability.[11] (Emphasis supplied.)

II.

THE PROVISIONS OF SECTION 13a(1) DO NOT DENY THE PRESUMPTIVE RIGHT TO JUDICIAL REVIEW OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION ALLOWING THE DISCONTINUANCES OF TRAINS.

These appeals present the issue of whether the public has the same right as a railroad to seek judicial review of final decisions of the Interstate Commerce Commission

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[11] Davis states elsewhere: "[A] good deal of administrative action that is now unreviewable should be reviewable. . . . [T]he presumption of reviewability might well be strengthened, so that a goodly portion of the borderline cases that are now unreviewable will be subjected to judicial check. I think that: (1) availability of judicial check does not weaken administrative power but strengthens it; (2) cutting off the courts sometimes violates the cardinal principle that functions should be allocated between courts and agencies on the basis of comparative qualifications; and (3) the principle of check is useful except for subject matter that is intrinsically unsuitable for review." Davis, *Judicial Control of Administrative Action: A Review*, 66 Colum. L. Rev. 635, 650-51 (1966).

in passenger train discontinuance cases under Section 13a(1) of the Interstate Commerce Act. This issue has been considered by the district court below and by six other three-judge district courts. Two early decisions ruled that States do not have the right to sue to set aside decisions of the Commission, entered after hearing and investigation, where the Commission finds that a passenger train is not required by public convenience and necessity and that continued operation of the train would unduly burden interstate or foreign commerce. *State of Minnesota v. United States,* 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire v. United States,* 251 F. Supp. 421 (D.N.H. 1965).

Subsequently, four district courts ruled to the contrary and held that the public does have the same right of judicial review as a railroad. *State of Vermont v. Boston & Maine Corp.,* 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport v. United States,* 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968); *State of New York v. United States* (No. 67-CV-207, N.D.N.Y. 1969);[12] *City of Chicago v. United States,* (No. 68-C-2184, N.D. Ill. 1969). Judicial review is pending, and trains are being operated pursuant to restraining orders, in two cases: *City of Sheridan v. United States* (No. 5316-Civil, D. Wyo.); *Penna. Pub. Util. Comm. v. United States* (No. 69-280, M.D.Pa.).

Another district court assumed jurisdiction without discussion. *People of State of California v. United States,* 258 F. Supp. 950 (N.D. Calif. 1966).[13] Mr. Justice Harlan, acting as a Circuit Justice, expressed an initial

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[12] Appeal pending, No. 100, October Term, 1969.

[13] Two unreported decisions have likewise assumed jurisdiction without discussion. See: 251 F. Supp. at 425.

view that judicial review does exist. *Public Service Board of State of Vermont v. United States,* 87 S.Ct. 3, 17 L.Ed.2d 42 (1966).

In *City of Williamsport v. United States,*[14] the district court followed a decision by another district court in *State of Vermont v. Boston & Maine Corp.,* 269 F. Supp. 80 (D.C. Vt. 1967), and upheld the right of judicial review, quoting from the opinion in such case as follows:

> [W]e fail to find convincing evidence that the Congress intended the unusual and concededly unfair result of granting judicial review of the Commission's determination solely to the roads, and not to opposing parties . . . If an order is wrongfully granted, the road can obtain review and reversal. If an order is wrongfully refused, ordinary principles of review of administrative determinations as well as elemental fairness call for review at the instance of opposing parties. Congress having set the standards for the Commission in the Act, its decision to refuse to order discontinuance as well as its decision to order it, should be reviewable . . . *City of Williamsport, supra,* 273 F. Supp. at 902.

Having so ruled the court proceeded to adjudication on the merits. *City of Williamsport v. United States,* 282 F.Supp. 46 (M.D. Pa. 1968). The case was appealed to this Court which affirmed *per curiam* on June 17, 1968, 392 U.S. 642, 20 L.Ed.2d 1348.

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[14] 273 F. Supp. 899 (M.D. Pa. 1967), *adjudicated on the merits,* 282 F. Supp. 46 (1968), *aff'd per curiam* 392 U.S. 642, 20 L.Ed. 2d 1348.

Accordingly, the NARUC asserts that the *Williamsport* decision is dispositive of these appeals and that the district court erred in not following it.

Neither a reading of Section 13a(1) nor its legislative history will support the position of the district court below that Congress intended to deny the public judicial review in train discontinuance cases.[15] To the contrary, the enactment of Section 13a(1) was a remedial effort to put an end to delays experienced in deciding "train-off" cases at the State regulatory level under former practice.[16] Hence, Congress provided alternatively for self-implementation by the railroad in cases where the Commission chose not to investigate a proposed train discontinuance, and for expedited consideration in those

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[15] *Williamsport v. United States*, 273 F. Supp. 899, 902-03 (M.D. Pa. 1967) wherein the court states: "There is nothing [in the legislative history of the Transportation Act of 1958] to suggest that Congress intended to deny judicial review of passenger discontinuances." See also, 2, U.S. Code Cong. and Admin. News, p. 3456 (1958). Noteworthy also are the Hearings Before the Surface Transportation Subcommittee of the Committee on Commerce on S. Res. 284, 89th Cong., 2nd Sess. (1966), concerning "Passenger Train Discontinuances." Such hearings evinced dismay over interpretation of section 13a(1) to, on one hand, grant review to the railroad, but on the other hand, deny it to the public. The hearings also made it clear that *all* section 13a(1) decisions are reviewable pursuant to 28 U.S.C. § 1336(a).

[16] The legislative history reveals that Congressional concern was limited to delays at the state regulatory level. No mention is made of delay occasioned by judicial review afforded by state courts. H.R. Rep. No. 1922, 85th Cong., 2nd Sess., 12 (1958). Such report states in part that: "Because of [local] delay in authorizing, or absolute refusal to authorize, discontinuance . . .it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the. . .Commission, rather than the State Commission pass on the discontinuance. . . ."

cases where the Commission instituted an investigation. It does not logically follow that an express Congressional intent to expedite administrative action is synonymous with an intent to deny judicial review of such action.

The district court below has sought to support its holding that judicial review does not lie for train discontinuance decisions under Section 13a(1) by comparing its language with Section 13a(2). The latter Section concerns interstate trains operating wholly within a single State and requires *express* Commission approval for discontinuance of service. The Court reasoned that since the administrative procedures under the two provisions are different the clear availability of judicial review under Section 13a(2) by implication precludes review under Section 13a(1) A.14.

This reasoning by the district court disregards the rationale of *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 141, 18 L.Ed.2d at 687, wherein this Court stated that:

> The Government . . . insists . . . that because the statute includes a specific procedure for such review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any . . . review. The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to

> others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."[17]

The legislative history of the Administrative Procedure Act, 5 U.S.C. § 1001, *et seq.* (1962), which is entitled to great weight in the Court's consideration of this case, contains the statement that:

> Very rarely do statutes withhold judicial review . . . To preclude judicial review . . . a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review. S. Doc. No. 248, 79th Cong., 2nd Sess., 212 (1946); H.R. Rep. No. 1980, 79th Cong., 2nd Sess., 41 (1946).[18]

And this Court in *Heikkila v. Barber*, 345 U.S. 229, 233, 97 L.Ed. 972, 976 (1963), similarly stated, "[m]ere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.[19] In *Rusk v. Cort*, 369 U.S. 367, 379-80, 7

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[17] The "leading authority" to whom the Court refers is Professor Jaffe, *supra*.

[18] See also, *Air Line Dispatchers Association v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849, 96 L.Ed. 641 (1951), reiterating that the mere fact Congress has not expressly provided for judicial review would be completely immaterial.

[19] In fact, even clear language appearing to limit or foreclose review may be inefficacious. For example, a provision that the action of an administrative body *shall be final* may or may not foreclose review. *Compare, Bridges v. Wixon*, 326 U.S. 135, 89

(Cont'd.)

L.Ed.2d 809, 817 (1962), the Court held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the Court restrict access to judicial review.[20] Accordingly, the Court recently held that Congress will not be presumed to cut off judicial review unless there is a persuasive reason to believe that such was the purpose of Congress. *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 140, 18 L.Ed.2d at 686.

Thus, inasmuch as Congress has not expressly precluded judicial review of Section 13a(1) decisions, entered after hearing and investigation, there is no sound reason for the courts to deny such review.

Sound policy favors judicial review as a guarantee against arbitrary action by the agency. *May Department Stores Co. v. National Labor Relations Board,* 326 U.S. 376, 380, 90 L.Ed. 145, 151 (1945). Noteworthy also, is the following statement by Roscoe Pound:

> [E]xperience shows the need of adequate provision for judicial scrutiny of administrative

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19 (Cont'd.)
L.Ed. 2103 (1945) with *Hallowell v. Commons,* 239 U.S. 506, 60 L.Ed. 409 (1916). The same is true of language providing that administrative action *shall not be reviewed. Compare, Blanchard Machine Co. v. Reconstruction Finance Corp., Price Adjustment Board,* 177 F.2d 727 (D.C. Cir.), *cert. denied,* 339 U.S. 912, 94 L.Ed. 1338 (1949) with *United States v. Babcock,* 250 U.S. 328, 63 L.Ed. 1011 (1919). Moreover, even unequivocal language providing that administrative decisions shall be final and conclusive and *no other official or any court of the United States shall have power or jurisdiction to review* any such decision may be disregarded. *Hospoder v. United States,* 209 F.2d 427 (3rd Cir. 1953); *contra, Siegel v. United States,* 87 F. Supp. 555 (E.D.N.Y. 1949).

20 See, 5 U.S.C. § 701 (1964 Supp. IV) stating that judicial review of final agency action is available except to the extent that statutes preclude review.

> so-called quasi-judicial determinations in order to assure due process of law, to keep administrative agencies not merely within their jurisdiction but also to hold them to the legislative policies in the statutes creating them and those otherwise established by law, and to insure that their determinations have an adequate oasis in evidence of logical probative force.[21] II Pound, Jurisprudence, p. 443 (1959).

Section 1336(a) of Title 28, United States Code (1964), states that:

> [E]xcept as otherwise provided by Act of Congress the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Obviously, Congress chose broad inclusive terms when it provided for judicial review of "any order"[22] of the Commission.

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[21] Earlier Pound Stated: "[E]xperience shows that it is by no means easy under the pressure of politics to maintain the independent bench which our constitutional polity requires. Yet the judges are given a high degree of independence by constitutional guarantees of their tenure and their salaries and the permanance of the courts in which they sit. There is no such assurance of independent boards and commissions. Any change of administration, any new Congress or legislature may bring reorganization, consolidation with other agencies, abolition, change of personnel, or cutting off of appropriations. Hence, administrative agencies are largely at the mercy of the legislature and under the control of the executive." Pound, Administrative Law, pp. 79-80 (1949).

[22] 5 U.S.C. § 551 (2) 1964, Supp. IV) defines a reviewable order as the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.

In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 93 L.Ed. 1451 (1949), this Court was concerned with the right of the United States as a shipper to seek judicial review of a Commission reparation order.

Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, provided that a shipper seeking reparation from a common carrier either had to seek his damages by instituting a law suit or by bringing a complaint before the Commission. The shipper could not pursue both remedies and had to exercise an election. Analogous to the case at bar, there was no express pronouncement concerning judicial review of a Commission decision and it was contended that decisions unfavorable to the carrier were reviewable, but that a similar right was not deemed vested in the shipper pursuant to the "negative order doctrine." In disposing of such contentions, the court stated that:

> [T]he section's careful provision for judicial protection of railroads against improper Commission awards argues against interpretation of the same section to deny to shippers any judicial review whatever. Under the suggested interpretation a shipper could recover nothing if the Commission decided against him. But a Commission award favorable to a shipper is not final or binding upon the railroad. . . . It hardly seems possible to find from the language of § 9 a Congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all. *Id.*, 337 U.S. at 435, 93 L.Ed. at 1459-60.

This Court further stated that:

> The contention of the Commission and the railroads . . . [is that] . . . the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.
>
> Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. (Citations omitted.) *Id.*, 337 U.S. at 433-34, 93 L.Ed. at 1459.

This Court, in interpreting the predecessor of Section 1336(a), stated that:

> [T]he *legal consequences* of this order if upheld will finally relieve the railroad of any *obligation* to the Government on account of the alleged unlawful charges; the order thus falls squarely within the type made subject to judicial review..." (Citations omitted.) (Emphasis added.) *Id.*, 337 U.S. 432-33, 93 L.Ed. 1458.

Similarly, this Court recently held in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 602, 16 L.Ed.2d 109, 127 (1966), and *Pennsylvania R. Co. v. United States*, 363 U.S. 202, 205, 4 L.Ed.2d 1165, 1168 (1960), that a Commission order is reviewable when *rights* or *obligations* are determined and legal consequences flow therefrom. Certainly this test is met in the instant appeals.

The district court below in denying judicial review of an order terminating an investigation of the Commission, and thereby allowing discontinuance of train service, has resurrected the "negative order" doctrine repudiated by this Court in *Rochester Telephone Corp. v. United*

States, 307 U.S. 125, 83 L.Ed. 1147 (1939). In language that is equally applicable to the instant case, Justice Frankfurter stated for the Court (307 U.S. 142-143, 83 L.Ed. 1159-1160):

> The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same.
>
> . . . We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and . . . this distinction . . . can no longer be guiding.[23]

The case of *Stark v. Wickard*, 321 U.S. 288, 88 L.Ed. 733 (1944), involved the regulation of milk prices. The Department of Agriculture had established a pool into which milk handlers made payment for milk and from which milk producers were to receive their payment. The

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[23] The overruling of the negative order doctrine has been confirmed in the Administrative Procedure Act which expressly includes a "negative" order within the definition of an "order" subject to review. See 5 US.C. (Supp. IV) 551, 701(b)(2), 702.

producers sought to enjoin the Secretary of Agriculture from allowing deductions from the pool to cooperatives. The statute involved specifically provided for review in certain instances, but was silent as to review of orders pertinent to deductions from the milk pool. The Court held the orders reviewable and stated, "it is not lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue . . . ". *Id.*, 321 U.S. at 309, 88 L.Ed. at 747. The Court further stated that:

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Id.*, 321 U.S. at 309-10, 88 L.Ed. at 748.

CONCLUSION

For the foregoing reasons, the judgments of the court below should be reversed and the cases remanded for determination on the merits.

Respectfully submitted,

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